No. 17-1717

# In the Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,
*Petitioners*,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
*Respondents*.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

## *AMICUS CURIAE* BRIEF OF THE THOMAS MORE LAW CENTER IN SUPPORT OF PETITIONERS

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

INTERESTS OF AMICUS CURIAE IN THIS CASE ..... 1

INTRODUCTION ..... 2

ARGUMENT ..... 5

I. THIS CASE MUST BE HEARD TO CORRECT A FUNDAMENTALLY FLAWED ANALYSIS THREATENING COUNTLESS HISTORICAL DISPLAYS WITH RELIGIOUS IMPLICATIONS. ..... 5

A. PASSIVE DISPLAYS SUCH AS THE BLADENSBURG MEMORIAL LACK THE ELEMENT OF GOVERNMENT COERCION THE ESTABLISHMENT CLAUSE IS DESIGNED TO PROSCRIBE. ..... 8

B. SUPREME COURT PRECEDENT DOES NOT REQUIRE A SYMBOL TO LOSE ALL RELIGIOUS SIGNIFICANCE BEFORE IT CAN BE USED IN PUBLIC DISPLAYS. .. 11

II. THE FOURTH CIRCUIT'S OPINION EXHIBITS IMPERMISSIBLE HOSTILITY TOWARD RELIGION. ..... 16

CONCLUSION ..... 21

## TABLE OF AUTHORITIES

### CASES

*Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*,
874 F.3d 195 (4th Cir. 2017) ..... 7, 16, 17, 21

*Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*,
891 F.3d 117 (4th Cir. 2018) ..... 4, 9, 11, 14

*Committee for Public Education & Religious Liberty v. Nyquist*,
413 U.S. 756 (1973) ..... 18, 19

*County of Allegheny v. ACLU*,
492 U.S. 573 (1989) ..... 9, 10, 11, 19

*Elk Grove Unified School Dist. v. Newdow*,
542 U.S. 1 (2004) ..... 8

*Everson v. Bd. of Educ.*,
330 U.S. 1 (1947) ..... 17

*Illinois ex rel. McCollum v. Board of Education*,
333 U.S. 203 (1948) ..... 18

*Lee v. Weisman*,
505 U.S. 577 (1992) ..... 21

*Lynch v. Donnelly*,
465 U.S. 668 (1984) ..... *passim*

*Marsh v. Chambers*,
463 U.S. 783 (1983) ..... 15, 17

*McGowan v. Maryland*,
366 U.S. 420 (1961) ..... 15

*Salazar v. Buono*,
559 U.S. 700 (2010) ..... 12, 13, 14, 21

*School Dist. of Abington Township v. Schempp*,
374 U.S. 203 (1963) ..... 5, 7, 21

*Town of Greece v. Galloway*,
134 S. Ct. 1811 (2014) ..... 5, 7, 8, 9, 10

*Trump. v. Hawaii*,
201 L. Ed. 2d 775 (June 26, 2018) ..... 21

*Van Orden v. Perry*,
545 U.S. 677 (2005) ..... *passim*

*Wallace v. Jaffree*,
472 U.S. 38 (1985) ..... 18

*Walz v. Tax Com. of New York*,
397 U.S. 664 (1970) ..... 10, 15, 19

*Widmar v. Vincent*,
454 U.S. 263 (1981) ..... 19

*Zorach v. Clauson*,
343 U.S. 306 (1952) ..... 18

**CONSTITUTION**

U.S. Const. amend. I ..... *passim*

**STATUTES**

3 J. Story, Commentaries on the Constitution and the United States (1833) ..... 5

John McCrae, *In Flanders Fields*,
http://www.greatwar.co.uk/poems/john-mccrae-in-flanders-fields.htm ..... 3

**RULES**

Sup. Ct. R. 37 ..... 1

## INTERESTS OF AMICUS CURIAE IN THIS CASE[1]

Thomas More Law Center is a national, nonprofit public interest law firm based in Ann Arbor, Michigan. It is dedicated to defending America's Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of human life. The Law Center accomplishes these goals on behalf of the citizens of the United States through litigation, education, and related activities. It is important to the Law Center and to the clients it serves in cities and towns across the nation that Americans retain the right to continue to display traditional symbols of our culture and heritage. The removal or destruction of veteran memorials and other historical displays simply because they contain religious symbols or imagery, exhibits a troubling hostility toward religion not countenanced by the Constitution. Resolution of this matter is of significant interest to the Thomas More Law Center and its clients.

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[1] Pursuant to Supreme Court Rule 37, counsel of record received timely notice of intent to file this brief and have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

## INTRODUCTION

The Bladensburg monument memorializes the ultimate sacrifice of forty-nine men from Prince George's County who died defending the United States in World War I. The loved ones these men left behind chose to honor them with a cross 100-years ago, a decision that should not be disregarded now. We cannot change the stories of the dead to appease the all too easily offended living. Any harm respondents feel they incur due to seeing the shape of a cross when they happen to drive past the Bladensburg memorial, pales in comparison to the real and lasting harm that destroying such memorials will cause to this country as a whole, to veterans' families, and to the memories of the men and women who are honored by them.

The Bladensburg memorial evokes the memory of the "crosses, row on row" that marked the graves of fallen soldiers in World War I. This scene is described in the famous memorial poem "In Flanders Fields," written by Major John McCrae in 1915 after the death of his friend and comrade:

> In Flanders fields the poppies blow
> Between the crosses, row on row,
> That mark our place; and in the sky
> The larks, still bravely singing, fly
> Scarce heard amid the guns below.
>
> We are the Dead. Short days ago
> We lived, felt dawn, saw sunset glow,
> Loved and were loved, and now we lie
> In Flanders fields.

> Take up our quarrel with the foe:
> To you from failing hands we throw
> The torch; be yours to hold it high.
> If ye break faith with us who die
> We shall not sleep, though poppies grow
> In Flanders fields.

John McCrae, *In Flanders Fields*, http://www.greatwar.co.uk/poems/john-mccrae-in-flanders-fields.htm (last visited July, 25, 2018).

As in all things, context matters. The use of the Latin cross in the context of a war memorial does not "establish" Christianity as a national religion, nor is its primary purpose to advance or inhibit religion. Rather, its primary purpose is to honor the dead using a historical symbol of death and sacrifice. In the case of the Bladensburg memorial, the Latin cross has particular historical significance because it is the symbol that was used to mark the graves of soldiers killed overseas during World War I. The decision to destroy this memorial, which existed without complaint for nearly a century, simply because the plaintiffs, passing motorists, claim to be offended by the memorial's use of the Latin cross, evidences an intolerance to religion, and Christianity in particular, that is wholly inconsistent with our nation's history and with the purpose and meaning of the First Amendment's Religion Clauses. Moreover, it fails to respect the decision of the bereaved parents who 100-years ago chose to honor their lost children with the monument as it currently exists. Judge Wilkinson's dissent from the denial of the petition for rehearing en banc eloquently describes the tragedy of the panel's decision:

> Forty-nine names appear on the plaque at the base of the Great War memorial in Prince George's County. Aggregate figures do not do justice to individual soldiers. Each name marks the tragedy of a life lost before its time. Each death marks a worthy sacrifice . . . The dead cannot speak for themselves. But may the living hear their silence. We should take care not to traverse too casually the line that separates us from our ancestors and that will soon enough separate us from our descendants. The present has many good ways of imprinting its values and sensibilities upon society. But to roil needlessly the dead with the controversies of the living does not pay their deeds or their time respect.

*Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 891 F.3d 117, 123 (4th Cir. 2018) (Wilkinson, J., dissenting from denial of rehearing en banc).

If the flawed reasoning of the Fourth Circuit's opinion in this case is allowed to stand uncorrected, it will put at risk countless war memorials and subject them to destruction simply because they contain religious symbols that have long been a part of our Nation's history. A cross is not *only* a religious symbol, it is also a universal symbol of sacrifice and death. To destroy this memorial or any other historic monument simply because it contains a cross would desecrate the memories of veterans who made the ultimate sacrifice for our country and would show an intolerable hostility toward religion that is prohibited by the First Amendment. Accordingly, this Court's intervention is urgently needed.

## ARGUMENT

### I. THIS CASE MUST BE HEARD TO CORRECT A FUNDAMENTALLY FLAWED ANALYSIS THREATENING COUNTLESS HISTORICAL DISPLAYS WITH RELIGIOUS IMPLICATIONS.

The Fourth Circuit's opinion in this case, and the flawed logic it employs, contribute to a sweeping effort to banish all religious imagery, themes, and substance from the public sphere. But despite what may be inferred from the Fourth Circuit's decision, the purpose of the Establishment Clause is not to prevent mere offense from individuals who are exposed to ideas with which they disagree. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014). "The real objective of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (quoting 3 J. Story, Commentaries on the Constitution and the United States 728 (1833)). The "basic purposes" of the First Amendment's Religion Clauses include seeking "to 'assure the fullest possible scope of religious liberty and tolerance for all.'" *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring). In reviewing the constitutionality of a display under the Establishment Clause, context and history are of paramount importance. The legal judgment employed "must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in

light of those purposes." *Id.* at 700. The Fourth Circuit's decision dooming the Bladensburg memorial cannot be reconciled with this requirement.

The Bladensburg memorial existed as a monument to fallen World War I soldiers for nearly 100-years before plaintiffs lodged their complaint. The history and context of the display demand a different conclusion than the one arrived at by the Fourth Circuit, particularly in light of this Court's precedent in *Van Orden v. Perry*. In *Van Orden*, the Court reviewed the constitutionality of "a large granite monument bearing the text of the Ten Commandments located on the grounds of the Texas State Capitol." *Id.* at 701. Although the "Commandments' text undeniably has a religious message," this was not outcome determinative; rather, in determining whether the display violated the Establishment Clause, the Court examined "how the text is *used*." *Id.* (emphasis in original). This required the Court to consider "the context of the display." *Id.* The tablets were "used as part of a display that communicates not simply a religious message, but a secular message as well." *Id.* Justice Breyer noted in his concurring opinion that the monument's 40-year history on the Texas state grounds indicated that the "State itself intended the . . . nonreligious aspects of the tablets' message to predominate" and that that had been the effect. *Id.* Of particular importance, Justice Breyer noted, was that 40 years had passed before the monument faced any legal challenge because:

> those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to

> have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to "engage in" any "religious practice," to "compel" any "religious practice," or to "work deterrence" of any "religious belief."

*Id.* at 702 (quoting *Schempp*, 374 U.S. at 305) (Goldberg, J., concurring).

Incredibly, despite this precedent, the Fourth Circuit found that the history of the Bladensburg memorial cross "does not clearly support one party over the other" even though it is "true that the Cross has stood unchallenged for 90 years." *Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 874 F.3d 195, 208 (4th Cir. 2017). Contrary to the analysis supplied by Justice Breyer in *Van Orden*, the Fourth Circuit rejected as "too simplistic" the argument that the unchallenged 90-year history of the cross "reinforces its secular effect." *Id.* Instead, the Fourth Circuit panel surmised that "[p]erhaps the longer a violation persists, the greater the affront to those offended." *Id.* The panel wrongly ignored the significance of the Latin cross as a symbol for World War I veterans and that the community had consistently recognized it as such for nearly 100 years. In doing so, the panel elevated the subjective feelings of a few over historical facts. But the purpose of the Establishment Clause is not to protect people from merely feeling offended by encountering religious symbols or imagery in the public sphere. *See Town of Greece*, 134 S. Ct. at 1826. Reviewing the Bladensburg memorial cross in light of its context and history, and

in light of the purpose of the Religion Clauses, can lead to only one conclusion: the memorial is constitutional and the Fourth Circuit's decision must be reversed.

### A. PASSIVE DISPLAYS SUCH AS THE BLADENSBURG MEMORIAL LACK THE ELEMENT OF GOVERNMENT COERCION THE ESTABLISHMENT CLAUSE IS DESIGNED TO PROSCRIBE.

Any concern regarding the government's establishment of religion from passive displays such as the Bladensburg memorial is substantially overblown. The average citizen, or the "reasonable observer," is not of such delicate moral fiber that he or she can be coerced by a slab of concrete in the shape of a cross any more than a brightly decorated evergreen tree or the sight of a manger at Christmas time. Clearly, mere offense does not equate to coercion. *Town of Greece*, 134 S. Ct. at 1826 (citing *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring) ("The compulsion of which Justice Jackson was concerned . . . was of the direct sort—the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree")). Yet, it is the mere offense felt by a few passing motorists that compelled the Fourth Circuit in this case to issue a decision that will result in the destruction of a treasured war veterans' memorial, which has existed for nearly a century. This decision cannot, consistent with history and this Court's precedent, be allowed to stand.

In *Town of Greece v. Galloway*, this Court held that legislative prayer is a constitutionally permissible practice with historical origins predating the First

Amendment. 134 S. Ct. at 1818, 1832-1834. The plaintiffs in *Town of Greece* "stated that the prayers gave them offense and made them feel excluded and disrespected." *Id.* at 1826. Addressing this complaint, the Court rightly recognized, "[o]ffense . . . does not equate to coercion." *Id.* And further noted that "[a]dults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum[.]" *Id.* Further, "legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate." *Id.* at 1827 (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)).

It defies reason to contend that a stationary stone monument sitting in a traffic median, which was erected nearly a century ago by grieving mothers of deceased World War I veterans, somehow presents a greater threat of government coercion than legislative prayer. It strains credulity beyond its limit to accept the Fourth Circuit's opinion in this case as anything other than a complete misapplication (or outright rejection) of controlling Supreme Court precedent. This misstep will have far-reaching consequences. *Am. Humanist Ass'n*, 891 F.3d at 123 (Niemeyer, J., dissent from denial of rehearing) (noting that the panel's decision has "far-reaching and unnecessary consequences" and that it "not only violates *Van Orden*" but "also needlessly puts at risk hundreds of monuments with similar symbols standing on public ground across the country, such as those in nearby

Arlington National Cemetery, where crosses of comparable size stand in commemoration of fallen soldiers"); *Town of Greece*, 134 S. Ct. at 1819 ("A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent."); *Van Orden*, 545 U.S. at 702-704 (Breyer, J., concurring in judgment).

In his dissent in *County of Allegheny v. ACLU*, Justice Kennedy pointed to Chief Justice Burger's opinion in *Walz* as being instructive wherein he stated the following:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

*Allegheny*, 492 U.S. at 661-662 (Kennedy, J., dissenting) (quoting *Walz v. Tax Com. of New York*, 397 U.S. 664, 669 (1970)). Justice Kennedy recognized that "[t]his is most evident when the government's act of recognition or accommodation is passive and symbolic, for in that instance any intangible benefit to religion is unlikely to present a realistic risk of establishment." *Id.* at 662. Accordingly, "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal." *Id.* The Supreme Court's cases "reflect this reality by requiring a showing that

the symbolic recognition or accommodation advances religion to such a degree that it actually 'establishes a religion or religious faith, or tends to do so.'" *Id.* (quoting *Lynch*, 465 U.S. at 678). Here, the Bladensburg memorial poses no threat to religious liberty and, consequently, this nearly 100-year old historic veterans' memorial should not be destroyed.

### B. SUPREME COURT PRECEDENT DOES NOT REQUIRE A SYMBOL TO LOSE ALL RELIGIOUS SIGNIFICANCE BEFORE IT CAN BE USED IN PUBLIC DISPLAYS.

The Fourth Circuit wrongly determined that the Bladensburg memorial could only be constitutionally permissible if the Latin cross had lost its religious significance. Judge Wynn, one of the initial panel judges, voting to deny the petition to rehear the case stated "the Latin cross has for centuries been widely recognized as 'the pre-eminent symbol of Christianity' [and] [n]othing in the First Amendment empowers the judiciary to conclude that the freestanding Latin cross has been divested of this predominantly sectarian meaning." *Am. Humanist Ass'n*, 891 F.3d at 118-119 (Wynn, J., voting to deny the petition to rehear). From this unremarkable observation, Judge Wynn wrongly concludes that the Fourth Circuit's "holding that the State's ongoing ownership and maintenance of the Bladensburg Cross violated the Establishment Clause recognizes that to hold otherwise would require this Court to accept the Commission's conclusion that the Latin cross *does not* have the 'principal or primary effect' of advancing the Christian faith." *Id.* (emphasis in original). This conclusion misstates the law and the facts of the case. The Court need not determine that

the Latin cross has lost all religious meaning, only that the use of the cross in *this* instance--to commemorate the fallen World War I heroes of Bladensburg--does not have the principal or primary effect of advancing the Christian faith. Such a finding is required by the facts and by Supreme Court precedent.

In *Salazar v. Buono*, 559 U.S. 700 (2010), this Court addressed the constitutionality of a land transfer involving government property that contained a veterans' memorial that was in the shape of a cross. *Id.* at 705. The plaintiff sought to enjoin the government's transfer of the land to a private party and to enforce an earlier injunction requiring removal of the memorial on Establishment Clause grounds. *Id.* at 710. In discussing the constitutionality of the land transfer, the Court reviewed Congress's motives and the context in which the land-transfer statute was enacted. *Id.* at 715. The Court noted that it was private citizens who had put the cross on Sunrise Rock, federal land, "to commemorate American servicemen who had died in World War I." *Id.* Of particular relevance to the instant case, the Court in *Salazar* recognized that, "[a]lthough certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message . . . [r]ather, those who erected the cross, intended simply to honor our Nation's fallen soldiers." *Id.* Thus, "[p]lacement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed." *Id.* Congress "designated the cross as a national memorial, ranking it among those monuments honoring the noble sacrifices that constitute our national heritage." *Id.* at 716 (citation omitted). Although the Court in *Salazar* was procedurally barred from revisiting the

Establishment Clause claim that formed the basis of the original injunction, the Court was careful to note that its discussion should "not be read to suggest this Court's agreement with that judgment, some aspects of which may be questionable." *Id.* at 718.

Most notably and applicable to the instant case, the Court stated without equivocation that "[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm." *Id.* The Court in *Salazar* criticized the lower court's finding that focused "solely on the religious aspects of the cross, divorced from its background and context." *Id.* at 721. This was in error because "a Latin cross is not merely a reaffirmation of Christian beliefs." *Id.* Instead, the Court noted, the Latin cross "is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Id.* Accordingly, as to the Latin cross memorial in *Salazar*, which (just like the Bladensburg memorial) was intended to honor the fallen American soldiers of World War I, the Court noted the cross "evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten." *Id.* The Court ultimately reversed the judgment of the Court of Appeals regarding the constitutionality of the land transfer and remanded the case for further analysis and inquiry by the district court. *Id.* at 722. Although the case was "ill suited for announcing categorical rules," the Court's acknowledgment in *Salazar* that the Latin cross in the context of a World War I memorial "evokes far more than religion" is particularly relevant

to the analysis of the Bladensburg memorial, and the Fourth Circuit was wrong to disregard it. *Id.*

Judge Wynn further states in voting to deny the petition to rehear the case that "[s]urely, the Constitution does not contemplate endowing the government with such extraordinary power to determine and prescribe individual citizens' religious beliefs and religious communities' joint understandings, appreciations, and teachings." *Am. Humanist Ass'n*, 891 F.3d at 121 (citation omitted). No, it surely does not. But this has absolutely nothing to do with the case before the Court. Declining to destroy a nearly 100-year old war veterans' memorial, the design of which was chosen by the deceased soldiers' loved ones a century ago, has absolutely nothing to do with the government determining or prescribing individual citizens' religious beliefs. The absurdity of such a concern, particularly as the basis for an appellate judicial decision, is reason enough for this Court to clarify its Establishment Clause doctrine.

The Fourth Circuit's treatment of the Latin cross cannot be squared with this Court's decision in *Van Orden v. Perry*, 545 U.S. 677. The Court in *Van Orden* took note of the religious acknowledgments present in the Nation's Capital, including the fact that "a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia." *Id.* at 689. The Court recognized the obvious: "[o]f course, the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance." *Id.* at

690. But, critically, the Court also recognized that the Ten Commandments "have an undeniable historical meaning" and that ***"[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."*** *Id.* (emphasis added) (citing *Lynch*, 465 U.S. at 680, 687; *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *McGowan v. Maryland*, 366 U.S. 420, 437-440 (1961); *Walz*, 397 U.S. at 676-678). Similarly, although the Latin cross has religious significance, in the context of a World War I memorial, it also has undeniable historical meaning.

The Bladensburg memorial was designed 100-years ago to honor forty-nine soldiers who were once residents of the county and who died in the battlefields of World War I. The laudable purpose of a monument is to honor someone who did something extraordinary, and to honor them in a way that has some significance to their lives, or to the people closest to them who they left behind. Here, the loved ones of the forty-nine soldiers whose names are inscribed on the Bladensburg memorial chose to honor them with a cross. That plaintiffs feel personally offended by seeing a cross on public property does not justify destroying this nearly 100-year old memorial to fallen soldiers. This case provides a critically necessary opportunity for this Court to clarify how passive displays involving religious imagery should be evaluated consistent with the Establishment Clause.

## II. THE FOURTH CIRCUIT'S OPINION EXHIBITS IMPERMISSIBLE HOSTILITY TOWARD RELIGION.

The Fourth Circuit's decision is at odds with this Court's precedents requiring tolerance and accommodation of religion. The panel's opinion begins by dedicating multiple paragraphs to discussing the actions and religious beliefs of private individuals who were associated with establishing the Bladensburg memorial in the early 1900s. *Am. Humanist Ass'n*, 874 F.3d at 200-201. The fact that these individuals were Christian is apparently viewed as evidence in favor of the Court's ultimate finding of an Establishment Clause violation, but it was not until 1961 that Maryland-National Capital Park and Planning Commission obtained title to the Cross and the land on which it sits due to traffic safety concerns. *Id.* at 201. Plaintiffs are "non-Christian residents of Prince George's County" who have "regularly encountered the Cross while driving in the area, believe the display of the Cross amounts to governmental affiliation with Christianity, are offended by the prominent government display of the Cross, and wish to have no further contact with it." *Id.* at 202. Plaintiffs "believe 'a more fitting symbol of [veterans'] sacrifice would be a symbol of the Nation for which they fought and died, not a particular religion." *Id.* The Court does not suggest that these people are themselves veterans, or that they are any relation to the men honored by the Bladensburg memorial, and they are obviously not themselves veterans of World War I. The Fourth Circuit ruling allows Plaintiffs, offended by the mere sight of a cross, to suggest "a more fitting symbol" than the one chosen by the families of the men who fought

and died for this country. Because Plaintiffs claim to be offended, the decision made 100-years ago by family members of the soldiers killed in action is rejected in favor of the opinion of strangers a century removed from them, and their monument is set to be destroyed.

The Fourth Circuit held that the Bladensburg memorial unconstitutionally endorses religion because, although "the Latin cross may generally serve as a symbol of death and memorialization, it only holds value as a symbol of death and resurrection because of its affiliation with the crucifixion of Jesus Christ." *Id.* at 207 (citations omitted). The panel disregarded the historical significance behind the Bladensburg cross stating "even if other countries may identify the Latin cross as a commemorative symbol of World War I, that acknowledgment does not dictate our analysis." *Id.* According to the panel, "this Nation, unlike others, maintains a clearly defined wall between church and state that 'must be kept high and impregnable.'" *Id.* at 207-208 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947)). This statement proves too much. "[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring) (citing *Marsh*, 463 U.S. 783). "Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* (internal citations omitted).

In *Lynch v. Donnelly*, this Court commented on the often used phrase, invoked by the Fourth Circuit in the decision below, noting that

> [t]he concept of a "wall" of separation is a useful figure of speech probably deriving from the views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.

465 U.S. at 673. Further, the Court recognized that "[i]t has never been thought either possible or desirable to enforce a regime of total separation . . ." *Id.* (quoting *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973)). And critically, "the Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.* (citing *Zorach v. Clauson*, 343 U.S. 306, 314, 315 (1952); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948)). "Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Id.* (citing *Zorach*, 343 U.S. at 314); *see Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) ("[T]he greatest injury of the 'wall' notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights.").

Accommodation and tolerance are recognizable aspects of this Court's decision in *Lynch v. Donnelly*, a case that determined that a crèche put up by the city of Pawtucket as part of a Christmas display was constitutionally permissible when viewed in the context

of the Christmas season. *Id.* at 680. The Court in *Lynch* found "insufficient evidence that inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message" noting that "[t]he crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday." *Id.* The Court addressed the concern that some observers could "perceive that the city has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion" by noting that, even assuming "that the display advances religion in a sense" the Court's "precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Id.* at 683. However, "[t]he Court has made it abundantly clear . . . that not 'every law that confers an indirect, remote, or incidental benefit upon religion is, for that reason alone, constitutionally invalid.'" *Id.* (quoting *Nyquist*, 413 U.S. at 771; *Widmar v. Vincent*, 454 U.S. 263, 273 (1981)). "Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." *Allegheny*, 492 U.S. at 657 (Kennedy, J., dissenting) (citing *Lynch*, 465 U.S. at 678; *Walz*, 397 U.S. at 669.) "Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious." *Id.*

For the Fourth Circuit's conclusion regarding the Latin cross in Bladensburg to be upheld in light of *Lynch*, the Court must take the illogical position that symbols associated with Christ's birth are sufficiently secular for public display, but symbols associated with His death are too religious and must be completely banned or, in the case of the Bladensburg memorial, destroyed. There is no basis for this conclusion. The use of the Latin cross in the Bladensburg memorial does not commemorate Good Friday or Easter Sunday. It commemorates soldiers who sacrificed their lives for the good of their country. The Fourth Circuit's statement that the cross is only significant because of Christ is obviously true, but it is also obviously true that Christmas is only significant because of Christ's birth. And yet, this Court has recognized that there are secular aspects to the Christmas holiday that have historical and cultural significance and can, consistent with the Constitution, be acknowledged and even celebrated by the government. More recently, in discussing the forty-year old display of the Ten Commandments in *Van Orden*, Justice Breyer rightly expressed concern that the removal of the display, "based primarily on the religious nature of the tablets' text would . . . lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring). And further, that "[s]uch a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.*

Judge Gregory, in his dissent from the panel's decision correctly recognizes that the court "cannot view neutrality as some sort of 'brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.'" *Am. Humanist Ass'n*, 874 F.3d at 215-216 (Gregory, C.J., dissenting) (quoting *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring)); *see Salazar v. Buono*, 559 U.S. at 726 (Alito, J., concurring in part and concurring in the judgment) (noting that demolition of a World War I monument in the shape of the Latin cross would "have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage.") (citing *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring)). If tolerance truly "presupposes some mutuality of obligation," *Lee v. Weisman*, 505 U.S. 577, 590-91 (1992), it is not demonstrated by the attempt to remove long standing memorials, to erase history, and to banish all symbols with religious significance from the public sphere. Because "[t]he First Amendment stands as a bulwark against official religious prejudice and embodies our Nation's deep commitment to religious plurality and tolerance," *Trump. v. Hawaii*, 201 L. Ed. 2d 775, 832 (June 26, 2018) (Sotomayor, J., dissenting), the Fourth Circuit's decision must be reversed.

## CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the erroneous and harmful decision of the Fourth Circuit Court of Appeals in this case.

Respectfully submitted,

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